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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EMC CORPORATION,

Petitioner,

v.

JOAN H. BRAITSCH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition wholly fails to undermine the reasons for granting review set forth in the petition. This case implicates an existing and widespread circuit conflict regarding the propriety of defendants' fee awards when some of the plaintiff's claims are frivolous, and offers the Court an opportunity to provide much-needed guidance to the lower courts on the important and recurring question of the proper standards for awarding attorney's fees to prevailing defendants. Plenary review should be granted so that the Court may address these significant questions.

I. This Case Squarely Presents The Circuit Conflict Over The Question Whether Prevailing Defendants Are Entitled To Fee Awards As Long As At Least Some Of The Plaintiff's Claims Were Frivolous

Respondent provides no meaningful response to EMC's persuasive showing (Pet. 12-14) that her 42 U.S.C. § 1985(3) claims and her employment discrimination claims against individual supervisors were frivolous, and indeed were barred by controlling precedent at all times relevant to this case.[1] Moreover, Respondent is judicially estopped from disput-

[1]Respondent offers the halfhearted defense that "Title VII law, especially in the Fourth Circuit[,] is in [a] state of flux." Br. in Opp. 26. The cases cited by Respondent for this proposition (*id.* at 27) have absolutely nothing to do with the claims she asserted in this case, however, and there was and is no uncertainty or confusion regarding the utterly groundless nature of her claims at the time she brought this lawsuit and at all times thereafter. Indeed, this Court barred Respondent's § 1985(3) claims some five years before she asserted them, and the circuits were and are unanimous in barring Title VII claims against individual supervisors. Pet. 13-14 (citing cases).

ing the frivolousness of those claims, because she has admitted in separate litigation against her former attorney that those claims were in fact frivolous. *See Bucholtz v. Braitsch*, Law No. 187385 (Va. Cir. Ct., Fairfax County), Amended Counterclaim at 2 ¶ 5 (alleging malpractice consisting of the "assertion of frivolous counts and theories in her attorney's filings" and "erroneously including certain individuals as named defendants"); *id.*, Opp. to Demurrer to Amended Counterclaim at 2 ¶ 3 ("assertion of frivolous counts, defendants and theories"). (Copies of these pleadings have been lodged with the Clerk for the Court's convenience.) Thus, it is incontrovertible that at least some of Respondent's claims in this case were frivolous, and accordingly the judgment of the court of appeals in this case is directly inconsistent with the decisions of other courts of appeals awarding attorney's fees to prevailing defendants in identical circumstances. *See* Pet. 15-17.

Respondent's attempt to distinguish away the conflicting authorities cited in the petition is wholly unsuccessful. Respondent contends that in the cases cited by EMC "the district court specifically made a finding that the claim on which attorney's fees were awarded was frivolous based on the finding that the plaintiffs had failed to even allege the crucial elements of the frivolous counts." Br. in Opp. 23. But the presence or absence of a district court "finding" of frivolousness is beside the point, because all such determinations are reviewable on appeal. The ultimate question is whether one or more of the plaintiff's claims were frivolous, not whether the district court correctly determined that issue. In this case, as conclusively demonstrated above, at least some of Respondent's claims were unquestionably frivolous, for reasons that were evident on the face of Respondent's complaint when judged against the controlling legal authorities. Thus, the cases cited in the petition that award attorney's fees where only some of

the plaintiff's claims are frivolous are squarely in conflict with the judgment below, which rejects a request for attorney's fees despite the undisputed fact that at least some of the claims asserted by Respondent were patently frivolous.

Respondent attempts to deny the significance of this issue by blithely asserting that the rule announced in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), "does not leave room for dispute in the circuits" and thus "there is no . . . conflict" among the authorities. Br. in Opp. 21, 22. As Respondent concedes, however, the courts in *Curry v. A.H. Robbins Co.*, 775 F.2d 212 (7th Cir. 1985), *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996), and *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995), each held that defendants are entitled to fee awards when only some of the plaintiff's claims were frivolous. By contrast, as the petition demonstrates and as Respondent effectively concedes, at least two other circuits (in addition to the court below) have reached precisely the opposite conclusion. *See* Pet. 17-18. Those courts squarely reject fee awards for defendants forced to defend against some frivolous claims, reasoning that the plaintiffs' cases were not *wholly* frivolous—a rationale that obviously would have precluded fee awards in *Curry*, *Andrade*, and *Head*. *See, e.g.*, *Colombrito v. Kelly*, 764 F.2d 122, 132 (2d Cir. 1985) (plaintiff's suit not frivolous "[o]n the whole"); *Tarter v. Raybuck*, 742 F.2d 977, 987 (6th Cir. 1984) (plaintiff's case not "wholly" without foundation).

Nor can Respondent successfully explain away the conflict by attributing it to the discretion granted district courts under the *Christiansburg* test. The Second and Sixth Circuits were clearly ruling as a matter of law in categorically rejecting fee awards where only some of the plaintiff's claims are frivolous. *Id.*; *see Sommers v. Schaefer*, 849 F.2d 1474,

1988 WL 61500 at *2 (6th Cir. 1988) (Table) ("[I]t is error to award attorney's fees against a claimant when some, but not all, claims are frivolous.") (citing *Tarter*); *In re Ruben*, 825 F.2d 977, 987 (6th Cir. 1987) ("The adding of some meritless claims does not make the whole case frivolous."). Moreover, Respondent's apparent view that the courts of appeals in these cases were simply deferring blindly to the decisions of the respective district courts is factually unsupportable (as well as legally erroneous). In *Head*, for example, the Eleventh Circuit reversed the district court's *refusal* to award fees with respect to those claims that the court of appeals found to be frivolous, 62 F.3d at 356, whereas in *Tarter*, the Sixth Circuit reversed the district court's *award* of fees even though it agreed that some of the plaintiff's claims were "'patently without merit.'" 742 F.2d at 987 (citation omitted). Thus, these precedents cannot be reconciled in the manner suggested by Respondent, and are instead in direct conflict.

Respondent also contends that the court of appeals' failure to award fees is justified by the fact that "the decision as to which legal theories should be pleaded is one that was made by her attorneys." Br. in Opp. 26. Respondent's contention is predicated on the erroneous assumption that fee awards to prevailing defendants constitute sanctions for litigation misconduct. This Court has made clear that such fee awards are not sanctions for bad faith conduct, but are instead awards of costs that are intended to deter the bringing of frivolous claims and compensate defendants for the burdens imposed by such claims. *See Christiansburg*, 434 U.S. at 418-20. Accordingly, the law is clear that a plaintiff's reliance on the advice of counsel is no defense to a claim for attorney's fees under a fee-shifting statute. *See, e.g., Davidson v. Keenan*, 740 F.2d 129, 133 (2d Cir. 1984) ("in awarding attorneys' fees to defendant in a Title VII case, if a claim is groundless, the mere fact

that the plaintiff relies on his attorney's erroneous contrary advice does not relieve him of liability"); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 916 (11th Cir. 1982) ("the perception that counsel was primarily at fault in filing or maintaining a frivolous, groundless, or unreasonable claim should play no role in the decision whether to assess attorney's fees against the plaintiff in a Title VII case"); *Prate v. Freedman*, 583 F.2d 42, 47-48 (2d Cir. 1978).[2]

Respondent also errs in contending (Br. in Opp. 28) that EMC lacks "standing" to recover the attorney's fees it expended in defending its employees against her frivolous claims. The cases she cites in support of that argument are wholly inapposite, because they stand only for the unremarkable proposition that prevailing *parties*, and not their *attorneys*, have the right to recover a reasonable attorney's fee in employment and civil rights litigation. EMC is unquestionably the prevailing party in this case, and it therefore has standing to seek a fee award under the precedents cited by Respondent. The applicable statutes authorize the award of all "reasonable" attorney's fees to the prevailing party. 42 U.S.C. §§ 1988(b), 2000e-5(k). Respondent does not contend that it was unreasonable for EMC to incur attorney's fees in defending its employees against her frivolous claims, nor would there be any basis for such an argument. EMC is therefore entitled to recover those fees. *Cf. Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 763-64 (9th Cir. 1981) (award of fees to

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[2]Of course, as the Eleventh Circuit observed in *Durrett*, in cases "in which the plaintiff's counsel may appear to be primarily culpable, the plaintiff may find relief from the effect of [this] rule in the form of a malpractice action." 678 F.2d at 916. As noted above (*see* p. 2, *supra*), Respondent has already brought a malpractice claim against the attorney who filed this lawsuit on her behalf, alleging that he improperly asserted frivolous claims in this case.

parents who litigated on behalf of minor does "not violate the letter or spirit of section 1988").

Accordingly, this case squarely presents the circuit conflict over the question whether prevailing defendants are entitled to fee awards as long as at least some of the plaintiff's claims are frivolous. The widespread division of authority over this question justifies this Court's review.

II. Review Is Also Warranted To Make Clear That An Award Of Attorney's Fees Is Required When A Plaintiff's Claims Fail As A Matter Of Law For Reasons That Were Or Should Have Been Apparent To The Plaintiff

As the petition compellingly demonstrates (Pet. 9-10), the federal courts are being subjected to a barrage of employment discrimination claims, many of them frivolous. Respondent suggests (Br. in Opp. 15-16) that this phenomenon is of no consequence, because the dramatic growth rate in such claims—which *tripled* between 1991 and 1998—may have temporarily leveled off and because, in Respondent's view, the single-minded goal of the fee-shifting statutes is to encourage the filing of employment discrimination claims at all costs. Needless to say, Respondent is mistaken.

As this Court made clear in *Christiansburg*, Congress expressly mandated that prevailing defendants would be entitled to fee awards in appropriate circumstances in order to "protect defendants from burdensome litigation having no legal or factual basis." 434 U.S. at 420. As shown in the petition, however, that salutary congressional goal has yet to be achieved, because the lower courts (including the court below) have transformed the *Christiansburg* standard into a license for civil rights plaintiffs to bring suit with impunity, secure in the knowledge

that prevailing defendants will virtually never receive fee awards and that frivolous "strike" suits aimed at extracting nuisance settlements therefore make economic sense. This Court's guidance is necessary to provide manageable standards to ensure that the federal courts award fees to defendants in appropriate cases and thereby achieve Congress's goals in enacting these fee-shifting statutes.

Respondent's principal objection to the rule of law sought by EMC is that it would purportedly "involve the very post-hoc reasoning which the *Christiansburg* Court warned against." Br. in Opp. 16-17. In Respondent's view, awarding attorney's fees on the ground that she was always on notice of the facts and legal principles that compelled dismissal of her claims would be inappropriate because "in light of discovery [Respondent] may have uncovered facts likely to support her claims." *Id.* at 17.

Contrary to Respondent's belief, however, *Christiansburg* did not purport to immunize plaintiffs from fee awards when they file baseless discrimination claims in the vain hope that a fishing expedition might turn up evidence that they have no reason to believe exists. The "*post hoc* reasoning" forbidden by *Christiansburg* is the assumption that "because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." 434 U.S. at 422-23. Insisting that a plaintiff have a legitimate basis for bringing suit *before* she files her lawsuit, and awarding fees to the prevailing defendant when the plaintiff is on notice of the fatal factual and legal flaws in her case from the very beginning, are entirely consistent with *Christiansburg*'s observation that plaintiffs must have a "reasonable ground for bringing suit." *Id.* at 422.

Indeed, Respondent's contrary rule would effectively preclude fee awards to prevailing defendants in *all* cases, because it is always theoretically possi-

ble that the law could change or unsuspected evidence could be discovered. When, as here, such theoretical and wholly speculative possibilities do not become reality, the plaintiff's decision to file a lawsuit lacking any basis in fact or law compels an award of attorney's fees to the prevailing defendant. This Court's review is necessary precisely because many lower courts have effectively adopted Respondent's contrary rule.

Respondent's attempt to justify her assertion of groundless discrimination claims is wholly unsuccessful. The extensive recitation of "facts" set forth in the brief in opposition is barren of citations to the opinions or record below, and for good reason: It is riddled with inaccuracies and distortions, and bears only a passing resemblance to the actual record in the case. EMC will not waste this Court's time by engaging in an item-by-item refutation of Respondent's misleading factual assertions. The dispositive point, wholly undisputed by Respondent, is that she knew from the outset of the litigation that she could not establish a prima facie case of employment discrimination in the termination of her employment because she was replaced by another member of the same protected class. Pet. App. 6a, 13a; *see St. Mary's Honor Society Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998); *see also Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *Blue v. United States*, 914 F.2d 525, 536 (4th Cir. 1990).

Similarly, Respondent was wholly unable to make out a prima facie case of discrimination in pay because, as was amply demonstrated by the administrative review conducted prior to the initiation of this lawsuit, she knew "that she was hired at the same compensation package as the other employee hired in 1990 (a male)" and that both male and female employees hired in 1991 received the same higher base

salary. Pet. App. 14a, 20a, 24a-29a.[3] Thus, Respondent was or should have been fully aware of the undisputed facts that compelled dismissal of her claims under long-established and unchallenged principles of employment discrimination law. An award of attorney's fees should be required in such circumstances, and this Court should take this opportunity to make that principle clear to the lower federal courts.

Respondent relies on *Hughes v. Rowe*, 449 U.S. 5 (1980), but that case involved a pro se plaintiff, and the *Hughes* Court made clear that the standard it announced was limited to that context: "[T]he allegations of [a pro se prisoner plaintiff] . . . are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* at 9 (citation omitted); *see id.* at 15. The lower courts have correctly read *Hughes* as announcing a special rule applicable only to the unique situation of pro se litigants. *Chester v. St. Louis Hous. Auth.*, 873 F.2d 207, 209 (8th Cir. 1989); *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987). Unlike the plaintiff in *Hughes*, of course, Respondent was represented by counsel throughout the course of this litigation, and she therefore cannot hide behind a rule designed solely for the benefit of pro se litigants.[4]

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[3]Respondent's salary comparison chart (Br. in Opp. 4-5) is egregiously misleading, because it ignores the undisputed fact that she (like her colleague Monkelien) could have elected to receive a "recoverable" draw in 1991 (*i.e.*, an advance against future commissions that was recoverable by EMC if the commissions were never earned). C.A. Jt. App. 274-75, 346; *see generally* Pet. App. 24a-26a (explaining EMC's draw policy and demonstrating that Respondent in fact received a *larger* draw than most of her male colleagues).

[4]Similarly misplaced is Respondent's reliance (Br. in Opp. 19-20) on *EEOC v. Reichhold Chemicals, Inc.*, 988 F.2d 1564 (11th Cir. 1993). In that case, unlike this one, the court held that the

Respondent's final contention—that EMC's request for this Court's review constitutes "retaliation," Br. in Opp. 29—is absurd. The questions presented in this petition involve an existing circuit conflict and a demonstrable need for guidance to the lower federal courts on an important and recurring issue. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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plaintiff had in fact made out a prima facie case of sex discrimination and retaliation. *Id.* at 1570-72. Thus, *Reichhold* provides no support for the denial of fees here, where Respondent failed even to make out a prima facie case and was fully aware of the facts that barred relief at the time she filed suit. Indeed, in direct refutation of Respondent's contention that her inability "to establish a prima facie case is irrelevant to the determination regarding attorneys' fees" (Br. in Opp. 18), *Reichhold* confirms that a plaintiff's failure to make out a prima facie case is an important factor to be considered in the *Christiansburg* analysis. *Id.* at 1569 n.2.